1982

Walker Bank & Trust v. Betty Jones et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

WALKER BANK & TRUST, Plaintiff/Respondent, v. BETTY JONES, Defendant/Appellant.	Case No. 18110
WALKER BANK & TRUST CO., Plaintiff/Respondent, v. GLORIA HARLAN, Defendant/Appellant.	Case No. 18111

BRIEF OF RESPONDENT

Appeal from the Third Judicial District Court
for Salt Lake County
Honorable G. Hal Taylor, Judge

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NATURE OF THE CASE

This is an action to recover money for purchases made with credit cards issued by Respondent to Appellants. Appellants contend that their liability for the purchases is limited to $50.00 under 15 U.S.C. § 1643. Respondent contends that Appellants' liability is governed by contract. The two cases involve identical contracts and nearly identical facts.

DISPOSITION IN LOWER COURT

The court granted Respondent summary judgment against each Appellant.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the District Court's judgments.

STATEMENT OF FACTS

A. Appellant Harlan

In July, 1979, Appellant Harlan, who was prior to that time a VISA cardholder at Respondent bank, requested that John Harlan be added to the account as an authorized user. (Harlan R. 32-33, 35) Respondent honored this request and issued Mr. Harlan a VISA card. (Harlan R. 32, 35) At some point between July and the end of 1979, Appellant Harlan informed the bank that she either wanted the account closed, or wanted the bank to deny further extensions of credit to her husband. (Harlan R. 28-37) These requests included two letters with identical

wording but different dates, both signed by Appellant Harlan. (Harlan R. 36, 37) The date of one of those letters, October 11, 1979, is clearly inconsistent with Appellant Harlan's sworn affidavit, in which she states that she and her husband separated in November, 1979. (Harlan R. 36, 28)

The letters from Appellant Harlan also claimed that she no longer had possession of her VISA card, that "(m)y VISA was destroyed in the AM-PM teller ("machine" in the second letter) at the bank." (Harlan R. 36, 37) Yet Appellant Harlan returned the VISA card to the bank three months after the latter of the two letters, in March 1980. (Harlan R. 34) When Appellant Harlan refused to pay any amounts owing on the VISA account, respondent instituted suit. (Harlan R. 7)

B. Appellant Jones

Respondent established VISA and Master Charge accounts for Appellant Jones at Appellant's request in 1977. (Jones R. 39, 40) On or about November 11, 1977 Appellant Jones wrote two letters to Respondent, indicating that she would no longer honor charges on the two accounts made by her husband, Richard Jones. (Jones R. 75) Respondent revoked both accounts and made numerous attempts by letter and otherwise to retrieve the cards from Mr. and Mrs. Jones. (Jones R. 59-61, 75-76) Despite the numerous notices of revocation and requests for surrender of her card, Appellant Jones continued to make

charges against the accounts and refused to return her card until March 8, 1978, when an employee of Respondent visited Appellant Jones' work place, and retrieved her card. (Jones R. 72-73, 75-76) Appellant Jones refused to pay the outstanding balances on the accounts, and Respondent instituted suit on December 12, 1978. (Jones R. 2-10)

ARGUMENT

I. LIABILITY FOR APPELLANTS' HUSBANDS' USE OF THE CARDS IS NOT GOVERNED BY 15 U.S.C. § 1643, THE "UNAUTHORIZED USE STATUE"

A. Appellants' husbands are not "unauthorized users" within the Congressional intent.

The fifty dollar limitation of liability for unauthorized use of a credit card, set out at 15 U.S.C. § 1643, and relied upon by Appellants, was not intended to limit liability in the present fact situation. During the 1960s, the growth of the credit card industry led to the growth of credit card fraud. Murray, "A Legal-Empirical Study of the Unauthorized Use of Credit Cards", 21 University of Miami Law Review 811 (1967). The danger that a lost or stolen credit card could be used fraudulently worried lenders as well as consumers, since the fear of unlimited liability undoubtedly deterred some potential cardholders from obtaining cards. Id. 811, 813.

To deal with the problem, Senator Proxmire introduced legislation to limit liability for lost or stolen cards to fifty dollars. 115 Cong. Rec. 1947 et. seq. (1969) (hereinafter "CR1").

The legislation was proposed in the context of the unlimited distribution of unsolicited credit cards. CR1, p. 1947. In that context, Senator Proxmire sought to set ground rules for issuing unsolicited cards and protect consumers if the unsolicited cards went astray. CR1, p. 1947. The threat of liability for cards lost in transit is a constant theme throughout the remarks accompanying the introduction of his bill, S. 721. CR1, pp. 1947, 1949, 1952.

The bill was passed by the Senate with certain perfecting amendments on April 15, 1970. 116 Cong. Rec. 11844 (1970), (hereinafter "CR2"). Again, the statements on the floor repeatedly emphasized that the purpose of the act was to prevent liability for lost or stolen cards. CR2, pp. 11829, 11831, 11840, 11841, 11842, 11843. Senator Proxmire, the bill's author, said "(t)he second amendment contains a valuable new requirement that the issuer provide the consumer with a stamped, self-addressed notification form which the consumer can use to notify the company of the card's loss or theft." CR2 at 11842 (emphasis added). Senator Percy, in presenting the minority's view, described the effect of the liability

limit as follows: "Once the cardholder notifies the issuer that his card has been lost or stolen, he retains no liability for misuse which may occur after that notification." CR2 at 11841 (emphasis added). With regard to imposing criminal liability of a $1,000 fine or 1 year imprisonment for unauthorized use, Senator Long said, "I hope that would be adequate, but it is certainly better than nothing with regard to people who have been stealing credit cards and using them in a way that amounts to theft." CR2 at 11839 (emphasis added). In discussing his amendment to bar the distribution of unsolicited cards, Senator McIntyre, a cosponsor, said "(t)he mailing of unsolicited credit cards invites theft and fraud. . . . Such cards bear a computer account number and lack only a signature to validate them. Therefore, any card which is misdirected or stolen from the mail may be used by anyone gaining access to it." CR2 at 11831 (emphasis added).

The debate touched on the use of cards by family members twice. First, Senator Proxmire noted "(e)limination of the unsolicited credit card reduces the likelihood that a family member will get a card without the knowledge of the head of the household." CR2 at 11829. Finally, in perhaps the most telling commentary of all, Senators Long and McIntyre carried on the following discussion of the effect of Senator Long's amendment adding criminal liability for unauthorized use:

Mr. McINTYRE. What happens if the husband and wife were having marital difficulties and the wife used her husband's credit card and he asserted that it was an unauthorized use of the card? Would the wife take the risk of going to jail?

Mr. LONG. I seriously considered that with respect to all relatives--and in conference this matter could be considered--we would not involve ourselves; that we would exclude from the provisions of the act unauthorized action by a spouse or anyone who was a direct descendant or ascendant or immediate member of a family.

We have the situation every day where a wife is supposed to exceed authorized spending. Those clashes, which occur from time to time, are looked on in the law as more of family disputes than crimes. Many times, when a husband is in a quarrel with his wife, from whom he is estranged, he is accused of kidnaping children. There often are cases in which a husband accuses a wife of taking something she is not supposed to have, or vice versa.

CR2 at 11840 (emphasis added).

The Senate Report was even more explicit:

> The purpose of the legislation is to safeguard the consumer by prohibiting the issuance of unsolicated credit cards and by limiting the consumer's liability for a lost or stolen card to not more than $50. Senate Comm. on Banking and Currency, Unsolicited Credit Cards S. Rep. No. 91-739, 91st Cong., 2nd Sess. 1 (1970) (emphasis added).

With few changes, the Proxmire proposal was ultimately enacted into law as Title V of Public Law 91-508 on October 26, 1970. That law is now codified at 15 U.S.C. sections 1642-44.

The context of the legislation is clear. It was enacted to deal with a perceived problem of unlimited cardholder liability where cards are lost or stolen, that is, where use was never authorized in the first place. Congress never intended the law to apply to the present situation, where use once authorized is revoked.

B. Appellants' Husbands' use was not "unauthorized" within the meaning of 15 U.S.C. § 1643.

The term "unauthorized use" is defined in 15 U.S.C. § 1602 (o) (1974) as:

> use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

A lost or stolen card fits this definition. When a thief presents the card for use, his signature will not match the signature on the card's signature line, and his name will not match the name imprinted on the card. Without question the thief has no implied or apparent authority to use the card.

Appellants' husbands, on the other hand, clearly had apparent authority to use the cards where their signatures were the same as the signatures on the cards, and where their names were the names imprinted upon the cards. See e.g., Martin v. American Express, Inc., 361 So. 2d 597 (Ala. Civ. App. 1978).

The language of the statute is clear and unambiguous. The "apparent authority" of the Appellants' husbands when they used the cards excludes them from the definition of unauthorized use, and consequently from the limitation of liability of 15 U.S.C. § 1643.

Any other interpretation of the statute would create absurd and grossly inequitable results. The potential for fraud would be enormous. The Alabama court, when confronted by this issue, aptly described one such potential for fraud:

> Were we to adopt any other view, we would provide the unscrupulous and dishonest card holder with the means to defraud the card issuer by allowing his or her friends to use the card, run up hundreds of dollars in charges and then limit his or her liability to $50.00 by notifying the card issuer.

Martin v. American Express, supra, at 601.

Another opportunity for such fraud is demonstrated by the very facts of Appellant Jones' case. Betty Jones herself continued to make charges against the account after notifying Respondent of her husbands alleged "unauthorized use"; and when Respondent sought to retrieve her cards, she claimed that they had been destroyed. Appellant Jones then sought to avoid all liability for charges made after the notification on the ground that they were Richards' "unauthorized" charges. Only by retrieving from the clearing house numerous transaction slips and manually sorting though them, all at considerable expense,

was Respondent ultimately able to determine that not only Richard Jones, but Appellant Jones herself was continuing to make charges against the account, (Jones R. 75, 79, 85-90).

How many charges Appellant Jones made is unknown. The critical fact is that she tried to avoid liability for the charges she did make by invoking the unauthorized use statute, thereby demonstrating the incredible potential for fraud which would be created if Appellants' proposed construction of 15 U.S.C. § 1643 were adopted by this court.

Furthermore, even if Appellants' construction of the statute were correct, the FTC has provided an exception to the statute when the "cardholder has engaged in fraudulent use of its credit card." See, In the Matter of Shell Oil Company, 95 F.T.C. 357 (1980). Certainly the issue of fraud is not too far below the surface when the file in the Harlan case shows two essentially identical letters with different dates and both files show that the Appellants continued to make use of their cards while telling the bank that they had no cards, or that the cards were destroyed, or that all the charges were being made by their husbands. (Harlan R. 33-34, 36-37 Jones R. 75, 79).

C. Appellant's notification to Respondent did not trigger the operation of the unauthorized use statute.

Appellants would have this court accept the proposition that it is notification to the card issuer which

renders use "unauthorized" use within the meaning of the Statute; ergo, the point at which Appellants notified Respondent terminated their liability. Appellants have demonstrated their misunderstanding of the statute by use of the following paraphrase of it:

> "[N]otice to Respondent bank ended the authorized use of Appellants' credit cards by their husband, their liability for charges after the notice is limited to $50.00 by federal law and regulations."

Appellant's Brief at p. 13-14.

The statute actually reads:

> "(a) A cardholder shall be liable for the unauthorized use of a credit card only if. . . the liability is not in excess of $50.00. . . and the unauthorized use occurs before the cardholder has notified the issuer. . .
>
> (d) Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card."

15 U.S.C. § 1643 (emphasis added).

The statutory language and congressional intent are exceedingly clear: it is the wrongful use of a card by one who never had authority to use it which renders the use "unauthorized" within the meaning of the statute. The notification to the card issuer has no bearing on whether the use is "unauthorized" so as to entitle a cardholder to the

statutory limitation of liability. The use is either unauthorized or it isn't regardless of notification. Under the statute a cardholder is liable for only $50.00 in unauthorized charges regardless of whether or not the issuer was ever notified; the notification serves only one purpose -- it eliminates the $50.00 liability if it is received before the unauthorized charges are incurred.

Thus, Appellants' contention that their notification in and of itself rendered the use unauthorized is totally without merit. Their notification is totally irrelevant unless Appellants can first demonstrate that their husbands' use, with or without notification, was "unauthorized".

When viewed in the context of congressional intent, discussed supra, the statute cannot be read any other way. The statute was intended to cover use by a thief or other wrongdoer who never had actual, implied, or apparent authority to begin with. Congress never intended the statute to apply to de-authorized use by a spouse. The only reasonable analysis to apply to Appellants' attempt to de-authorize their husband's use and terminate their liability is whether their actions were sufficient under the contract.

II. LIABILITY FOR APPELLANTS' HUSBANDS' USE OF THE CARDS IS GOVERNED BY THEIR CONTRACTS WITH RESPONDENT

Respondent, like other card issuers, willingly assumes certain risks when it issues cards to applicants; one of those risks is that the card will accidently fall into the hands of a wrongdoer by loss or theft. In such a case the cardholder has little more opportunity than does the issuer to prevent the wrongdoing. Consequently, the Congressional decision to place such a risk on the issuer by enacting 15 U.S.C. § 1643 is ultimately fair and equitable and is a conscious risk taken by card issuers.

Quite the opposite, however, is the situation presented by Appellants. Appellants themselves created the opportunity for their husbands to use the cards and they consciously and contractually assumed the risk. In reliance on the contractual promises and the credit rating of the Appellants, Respondent allowed their spouses to have cards with their names imprinted thereon; and merchants in reliance upon the apparent authority demonstrated by the cards allowed the spouses to make charges. Now Appellants would seek to shift the risk and avoid their contracts by invoking the "unauthorized use" statute. Appellants' argument is totally without merit.

Appellants had available to them a perfectly adequate means of terminating their liability, a method provided for in the terms of Appellants' contracts with Respondents -- simply returning the cards to Respondent. Yet Appellants, knowing full well the requirements for terminating their liability, refused and failed to take the steps necessary to do so. Rather they preferred to keep their cards and make additional charges and then avoid liability by claiming "unauthorized use." Appellants received the benefit of their bargain with Respondent and should not be allowed to deprive Respondent of its benefit by a distorted interpretation of the statute. Instead, Appellants' liability and the termination of that liability should be governed solely by the contract upon which Respondent relied in issuing the cards to the husbands.

III. RESPONDENT HAD NO OBLIGATION TO SUE APPELLANTS' HUSBANDS

Appellants would have the court infer some significance to Respondent's choice of defendants below, i.e., the suits were brought only against the wives, and not their husbands. (Appellants' Brief Page 6) Appellants failed to cite any authority for this unusual proposition with regard to neccesary parties or indispensability, and Respondent rejects it. Further, Respondent directs the court's attention to the interpretation of the Federal Reserve Board, which declared

"that no primary contractual liability on the credit card account is imposed upon the other spouse (spouse B) merely by issuing a card at the request of the spouse A." FRB Official Staff Interpretation Number FC-0070, 42 Fed. Reg. 25,491 (1980). Thus Respondent's choice of defendants at the District Court level was simply in keeping with the Truth-in-Lending Act, and has no further or independent significance.

IV. THE CASES CITED BY APPELLANTS SUPPORT RESPONDENT'S, NOT APPELLANTS', POSITION.

Appellants' citation of an Ohio case for the proposition that a cardholder is not liable for charges by an authorized user after notification is utterly wrong. Rather, the Ohio Court of Appeals held that an authorized user ("recipient of related card") is not liable for cash advances made to the cardholder. Cleveland Trust Co. v. Snyder, 55 Ohio App. 2d 168, 9 Ohio Ops. 3d 329, 380 N.E. 2d 354, 360 (1978). Furthermore, the Ohio court, in dicta, stated:

> That the cardholder is liable for the charges to his account, made by himself and by a holder of a related card, is clear.

Cleveland Trust Co. v. Snyder, 380 N.E. 2d at 360.

Respondent urges this Court to follow the careful analysis used by the Ohio court in reaching the decision they actually made.

The New York case cited by Appellants also supports Respondents' position that it is the contract which governs Appellants' liability, not 15 U.S.C. § 1643. The New York court held that the cardholder did revoke the account and terminate his liability for his wife's use where he gave the card issuer notice and surrendered his card. Socony Mobil Oil Co. v. Greif, 10 A.D. 2d 119, 197 N.Y.S. 2d 522 (1960). The court went on to suggest that had the credit card contract explicitly required the surrender of both cards, it would enforce it. "Plaintiff's contention as to the necessity of the surrender of both cards has no support in any of the contract provisions and there seems to us no sufficient basis for inferring such a condition." Socony Mobil Oil Co., v. Greif, 197 N.Y.S. 2d at 523. This case obviously supports Respondent's position that the terms of the contract, not 15 U.S.C. § 1643, govern the termination of a cardholder's liability for charges made by one whom that cardholder previously authorized to use the card.

CONCLUSION

The limit on liability for unauthorized use of credit cards of 15 U.S.C. § 1643 was not intended by Congress to apply to Appellants' situation. Even if it were applicable, Appellants do not come within the meaning of the statute because their husbands had "apparent authority" when they used

the cards. For these reasons, this court should hold that the unauthorized use statute does not apply where the use has previously been authorized and the user did not obtain the cards by wrongful means, and that it is the contract between the cardholder and card issuer which governs the liability in such a situation. The Summary Judgments of the Third Judicial District Court should be affirmed.

DATED this 3rd day of May, 1982.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed two copies of the foregoing Brief of Respondent to: Bruce Plenk, Esq., and Ron Nehring Esq., Attorneys for Appellants, 637 East 4th South, Salt Lake City, Utah 84102 on the 3rd day of May, 1982.